UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FP HOLDINGS, L.P., D/B/A PALMS CASINO RESORT **and** **LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, A/W UNITE HERE INTERNATIONAL UNION**	**Case No. 28-CA-224729**

EMPLOYER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND NOTICE TO SHOW CAUSE

Pursuant to National Labor Relations Board ("Board") Rule 102.24(b) and the Notice to Show Cause issued by the Board on September 5, 2018, and within the time called for in the Notice to Show Cause, Respondent FP Holdings, L.P., d/b/a Palms Casino Resort ("Palms" or "Employer") hereby responds to the Motion to Transfer and Continue Matter Before the Board and for Summary Judgment ("Judgment") filed by the General Counsel for the National Labor Relations Board.

I. INTRODUCTION

The Palms was acquired by Station Casinos LLC in October, 2016. Since then, it has been in a state of constant and planned change – including the opening of new bars and restaurants, the revamping of its main pool, the development of new ultra-luxury suites, the addition of nearly 60 new guestrooms, the expansion of casino space, and the shuttering of older restaurants and amenities that are inconsistent with the Palms' revitalized image. All told, Station Casinos has or will invest approximately $620 million into modernizing the Palms into a world-class hotel-casino. These upgrades and renovations will have a commensurate effect on the Palms workforce. As relevant here, these changes will substantially transform the makeup of

the petitioned-for bargaining unit, including the net creation of 234 new bargaining unit positions.

Because of the effect of the ongoing Palms renovation on the composition of the petitioned-for unit, the Union's Petition should have been dismissed by the Regional Director until a substantial and representative complement of employees, including these new employees, is hired at the Palms. Instead, after a hearing at which the Palms expansion was detailed, the Regional Director erroneously ordered that an election proceed for the petitioned unit. As shown below, the Regional Director failed to conduct the case-specific analysis called for by Board precedent in cases of "expanding units" like the petitioned-for unit at the Palms and, in so doing, vitiated the Section 7 rights of the soon-to-be-hired group of employees to have a say in their representation. While these matters were already raised in the underlying representation proceeding, the Regional Director's conclusion was without legal basis and the Board should take this opportunity to correct it prior to review by a federal appellate court.

Further, although the General Counsel's Motion treats this as a pure test of certification case, it is not. The General Counsel also seeks summary judgment as to the Employer's refusal to respond to the Union's information request. That request seeks information that is not presumptively relevant and has no bearing whatsoever on any bargaining unit employees (such as the identities of construction contractors and subcontractors Palms is using for renovations, the vendor(s) it from which it purchases slot machines, etc.). Accordingly, because the Union's information request raises factual issues that cannot be resolved on summary judgment, the General Counsel's Motion should be denied.

II. BACKGROUND

Despite the Regional Director's erroneous conclusions regarding the bargaining unit, the D&DE properly set forth the essential facts regarding the planned Palms modernization and expansion. (GCXs 5-6.) Station Casinos acquired the Palms in October, 2016, and has since been undergoing significant upgrades and renovations. Although some of the work has been completed, Palms' transformation remains in progress. As noted in the D&DE, within the upcoming year, Palms will:

- Open a new steakhouse called "Scotch 80" that will be operated by Palms and employ approximately 71 additional bargaining unit team members;
- Open "Center Bar" and another casino floor bar, adding at least 25 bargaining unit team members;
- Add premium, ultra-luxury suites and approximately 60 new guestrooms, adding at least 36 bargaining unit team members;
- Upgrade and expand its casino space, adding approximately 27 bargaining unit team members;
- Revamp and expand its catering spaces, adding 33 bargaining unit team members;
- Renovate its Team Member Dining Room;
- Open a new spa & salon; and
- Open a number of new restaurant, bar and club concepts.

All of these changes are expected to be completed or substantially completed within the next year, with many (such as the openings of the Scotch 80 steakhouse and "Center Bar") to have been completed within 2-3 months after the Petition was filed. All told, Palms expects a net addition of 234 potential bargaining unit employees before the end of 2019, representing an increase in headcount of over 25%.

On April 6, 2018, in the midst of these ongoing transformations, the Union filed its Petition. The Regional Director issued the D&DE on April 23, and the election was held on

April 27-28, 2018. The Union received a majority of the valid votes cast. The Regional Director subsequently certified the Union on May 9, 2018. (GCX 8.) The Employer's Request for Review was denied by the Board on August 16, 2018. (GCX 14.)

On May 16, 2018, the Union sent a request for information to the Employer. The information request seeks information that is not presumptively relevant, such as a list of any contractors or vendors used by the Palms, including those who have no relationship with or impact on any bargaining unit employees.[1] (Ex. A to GCX 16.)

Because the certification of the Union is legally erroneous, the Employer has engaged in a technical refusal to bargain with the Union in order to test the underlying certification. On August 1, 2018, the Union filed a charge alleging that Palms refused to recognize and bargain with it. (GCX 15.) The Acting Regional Director for Region 28 issued a complaint based on the charge, and the Employer filed an Answer admitting that it was refusing to bargain because the Union was improperly certified and denying that the requested information was relevant and necessary for collective bargaining. (GCXs 16-18.)

III. THE MOTION SHOULD BE DENIED

A. The Union Was Improperly Certified

The Regional Director ordered the election to proceed despite the uncontroverted hearing evidence that the Employer is in the midst of a major expansion that will have a significant effect on the size of the petitioned for bargaining unit. While the right of current employees to select or reject a bargaining representative is significant, the Board "does not desire to impose a bargaining representative on a number of employees hired in the immediate future, based upon

[1] The General Counsel's Motion seeks summary judgment as to the information requests listed in paragraph 11(a)(9). The Employer notes that the Union's original information request included additional objectionable requests for information, such as employee social security numbers and copies of any medical claims submitted to the Company's health care plan administrator (which would reveal confidential and private medical information).

the vote of a few currently employed individuals." *Toto Indus.*, 323 N.L.R.B. 645, 645 (1997). In these "expanding unit" cases, the Board must determine whether the current employee complement is "substantial and representative" of the final workforce composition. *Id.* In doing so, the Board avoids "any hard and fast rules," and instead utilizes a case-by-case approach considering nine factors:

> (1) the size of the present work force at the time of the representation hearing;
>
> (2) the size of the employee complement who are eligible to vote;
>
> (3) the size of the expected ultimate employee complement;
>
> (4) the time expected to elapse before a full work force is present;
>
> (5) the rate of expansion, including the timing and size of projected interim hiring increases prior to reaching a full complement;
>
> (6) the certainty of the expansion;
>
> (7) the number of job classifications requiring different skills which are currently filled;
>
> (8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and
>
> (9) the nature of the industry.

Id.; *see also K-P Hydraulics Co.*, 219 N.L.R.B. 138, 138 (1975) (ordering dismissal of petition where employer did not employ a substantial and representative complement of employees); *Some Indus., Inc.*, 204 N.L.R.B. 1142, 1143 (1973) (dismissing petition as premature even though employer had hired a "substantial" complement of employees).

Here, the factors correctly applied weighed in favor of dismissal of the petition, without prejudice to re-filing once a substantial and representative complement of employees is hired. *K-P Hydraulics*, 219 N.L.R.B. at 138. First, the employees disenfranchised by the Regional Director's decision to direct the election is substantial – approximately 234 employees, representing an increase in headcount of more than 25%. Second, the expansion plans are

immediate, definitive, and scheduled to be completed in the near future, such that the burden on existing employees' right to obtain representation is comparatively slight as weighed against the total disenfranchisement of the prospective employees. Accordingly, when considering the impact of the relatively minor delay in the right of existing employees to obtain representation as against the complete loss of prospective employees' Section 7 rights to choose to engage in or refrain from joining a union, the balance properly weighed in favor of dismissing the petition until a representative complement is hired.

The Regional Director erred in applying the expanding unit factors to the unit at issue here. Rather than considering all of the case-specific factors based on the evidence presented by the Palms, the Regional Director employed a rigid, mathematical analysis in deciding that there was a substantial and representative component of the unit in place. This mechanistic, bright-line approach was of the type explicitly rejected by the Board in *Toto* –which cautioned against "hard and fast rules" and demanded a case-by-case, fact-specific reckoning. In applying this erroneous analysis, the Regional Director ignored the evidence presented by the Employer of the near-term imminence and certainty of the unit expansion and disregarded the disenfranchising effect of an immediate election on the large number of workers to be added to the unit. Accordingly, because the underlying certification was erroneous, the Employer has not violated the Act by refusing to recognize and bargain with the Union.

B. The Request for Information Raises Factual Disputes That Cannot Be Resolved On Summary Judgment

Further, even if the Union were properly certified, the Motion should be denied because the Union's information request seeks information that is not necessary and relevant to collective bargaining. For instance, the information request seeks the identities of <u>all</u> contractors, subcontractors, and vendors who provide services to Palms, regardless of whether they have any

direct or indirect impact on bargaining unit employees. This information is not presumptively relevant and the Employer is unaware – and the General Counsel has certainly failed to prove – why such an overbroad request is necessary and relevant to bargaining. As resolution of these issues requires a factual determination under Board law, the Motion should be denied on this ground as well.[2] *See, e.g., Broden, Inc.*, 318 N.L.R.B. No. 112 (1995) (charge alleging failure to furnish information presented factual issues not amenable to summary judgment where employer made objections of overbreadth and lack of presumptive relevance, among others).

IV. CONCLUSION

For the reasons set forth above, the General Counsel's Motion should be denied and the underlying certification should be vacated without prejudice to refiling the petition once a substantial and representative complement of employees is hired.

Respectfully Submitted,

Date: September 14, 2018

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[2] If the Union's certification is upheld, it is possible that the parties and/or General Counsel may negotiate a mutually-agreeable narrowing of the Union's request. But both Board and federal law prohibit the Employer from engaging in such negotiations while it is engaged in a technical refusal to bargain, upon pain of waiving its certification challenge. *See, e.g., Technicolor Govt. Services, Inc. v. NLRB*, 739 F.2d 323, 326-27 (8th Cir. 1984); *Queen of the Valley Med. Ctr.*, JD-15-18, 2018 WL 1110298 (N.L.R.B. Div. of Judges Feb. 28, 2018).

CERTIFICATE OF SERVICE

I hereby certify this 14th day of September, 2018, that a copy of the Employer's Response to Motion for Summary Judgment and Notice to Show Cause was electronically served on:

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